IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-73

ADELAIDE SHIPPING LINES, LTD.
SALEN REEFER SERVICES AB, and M.V. GLADIOLA,

Petitioners,

—v.—

SUNKIST GROWERS, INC.,

Respondent.

BRIEF OF ASSURANCEFORENINGEN SKULD AMICUS CURIAE IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

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By written consent of Petitioners and Respondent filed separately with this brief, Assuranceforeningen SKULD files this brief as *amicus curiae.*

Interest of the Amicus Curiae

Assuranceforeningen SKULD is an association incorporated under the laws of the Kingdom of Norway with its central headquarters located in Oslo, Norway. The business of Assuranceforeningen SKULD is to provide to shipowners and charterers on a worldwide basis mutual insurance against liability and losses incurred by its Members in connection with an operation of vessels

entered. SKULD at the present time has entered 3,968 vessels with a total gross registered tonnage of 26,300,000 from 37 countries.[1] In addition, SKULD has approximately 5,800,000 gross registered tons of entries from 21 countries[2] relating to charterer's coverage.

Most of the tonnage described above is engaged in international commerce and in pursuit of that trade regularly call at ports in the United States to load and discharge cargo. SKULD and its Members will be directly affected by the decision of the United States Circuit Court of the Ninth Circuit as it relates to the application of the Limitation of Shipowner's Liability Act (Fire Statute), 46 U.S.C. §182, and the fire exemption found in the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(b), as will marine underwriters and all carriers who transport cargo to and from the United States.

Therefore, Assuranceforeningen SKULD respectfully files this brief as *amicus curiae* in support of Petitioners' Writ pursuant to Rule 42 of the Revised Rules of this Court.

ARGUMENT

Assuranceforeningen SKULD is in full accord and fully supports the statements made in Petitioners' brief. The

[1] The flags of registry include the following countries:
Argentina, Australia, Bahama, Bangladesh, Belgium, Bermuda, Brazil, Canada, Curacao, Cyprus, Denmark, England, Finland, France, Germany, Greece, Greenland, Holland, Honduras, Hong Kong, Iceland, India, Indonesia, Iran, Italy, Kuwait, Lesser Antilles, Liberia, Nigeria, Norway, Panama, Saudi Arabia, Singapore, Spain, Sweden, Switzerland, U.S.A.

[2] The nationalities of the charterers include:
Argentina, Australia, Belgium, Bermuda, Brazil, Canada, England, France, Germany, Gibraltar, Holland, Israel, Italy, Kuwait, Lichtenstein, Norway, Panama, South Africa, Switzerland, Taiwan, U.S.A.

subject of this case, as in all ship fire cases, relates not merely to cargo or property damage, but rather to the important function of who should bear the *loss* for fire damage. The question has far reaching economic impact on shipowners and carriers, as well as their respective underwriters. The Circuit Court in its decision has decided to ignore the intentions of Congress expressed more than 125 years ago in the Fire Statute, 46 U.S.C. §182, and later reaffirmed by the fire exemption in the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(b). The Court abandons the purpose and objective of the Fire Statute and fire exemption and adopts for the Ninth Circuit a rule separate and apart from the rest of the land.

The Ninth Circuit opinion is in sharp conflict, as we will demonstrate, with the legislative purpose and intent expressed by Congress as well as the consistent judicial interpretation given both the Fire Statute and the fire exemption by U.S. Courts (the Ninth Circuit included) as long as the statutes have been law in this country.

The numerous shipowners and charterers, who are members of this worldwide mutual association, will suffer severe financial damage as a result of this decision if it is allowed to stand. It has caused great confusion and consternation in insurance circles and will lead to wasteful duplication of insurance by underwriting interests that represent both the carrier interests, as SKULD does, and the cargo underwriters, such as the Fireman's Fund Insurance Company (cargo underwriters of Respondent) that insure cargo shipped to and from the United States.

The issue presented here is not simple nor does it lend itself to easy explanation. However, one thing is and has always been abundantly clear (until this case) and that is when damage results to cargo from a shipboard fire, the shipowner or charterer will be held liable only if a

causative factor of the fire was *personal* to the owner or charterer. This exoneration does not depend on the exercise of "due diligence" by crew-members, stevedores or other low-level employees. This interpretation followed by our Courts since 1851 did not arise by chance or by judicial interpretation, but as the result of a *conscious scheme by the Congress of the United States to keep America in active competition with the world shipping community.* The scheme was not intended to give an advantage to carriers or a disadvantage to shippers, but simply to place the United States ocean commerce on the same insurance basis as its competitors.

This Court, speaking through Mr. Justice Jackson, in *Consumers Import Co., Inc. v. Kabushiki Kaisha Kawaski Zosenjo (The Venice Maru),* 320 U.S. 249, 254-256 (1943) concisely sets forth the Fire Statute's background and purpose:

> At common law the shipowner was liable as an insurer for fire damage to cargo. We may be sure that this legal policy of annexing an insurer's liability to the contract of carriage loaded the transportation rates of prudent carriers to compensate the risk. Long before Congress did so, England had separated the insurance liability from the carrier's duty. To enable our merchant marine to compete, Congress enacted this statute. It was a sharp departure from the concepts that had usually governed the common carrier relation, but it is not to be judged as if applied to land carriage, where shipments are relatively multitudinous and small and where it might well work injustice and hardship. The change on sea transport seems less drastic in economic effects than in terms of doctrine. It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. *Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.* (Footnotes omitted. Emphasis added.)

The decision in *The Venice Maru,* supra, expresses no more than this Court's understanding that Congress recognized that a vessel owner or charterer and cargo interests have a right to allocate the risk of fire damage contractually rather than having the risk shuffled back and forth on a case by case basis. While *The Venice Maru* deals with the Fire Statute, the identical purpose and policy underlies the fire exemption of the Carriage of

Goods by Sea Act. *A/S J. Ludwig Mowinckles Rederi v. Accinanto, Ltd.* 199 F.2d 134, 144 (4th Cir. 1952) *cert. denied* 345 U.S. 992 (1953).

What the statute does is to give the shipper a choice of buying his own coverage for fire risk (other than for a fire caused by carrier's personal fault) or not buying it, rather than having such high cost coverage forced upon him by its incorporation in the carrier's freight rate structure.

The purpose behind the Fire Statute and fire exemption is easily understood when it is reviewed in the framework of a standard ocean movement of cargo. The shipper prepares his cargo for shipping and in doing so customarily purchases an "open cargo policy" for either his account or for the consignee that protects the cargo against loss or damage. In such standard policy appears the "perils clause"[3] listing the perils or damages insured against. One of those perils insured against is fire. Therefore, if during the movement of the cargo from shipper to ultimate consignee damage by fire occurs, the cargo interest, be it the shipper or consignee, "will be made whole." See W. Winter, *Marine Insurance* 174-75 (3d ed. 1952). This cargo insurance underwriter covers all fire damage and knows that the risk of fires not caused by the ocean carrier's personal fault is his risk and will not be recoverable in a subrogation case. He thus structures his premium accordingly.

[3] "Touching the adventures and perils which the said . . . . Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, *fires*, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof." (Emphasis added).

This insurance coverage is what Mr. Justice Jackson referred to in *The Venice Maru*, supra, as a second contract of carriage between the shipper and ocean carrier.

On the other side of the ocean movement, we have the ocean carrier, be it a vessel owner or charterer, who offers to carry the cargo pursuant to a contract of carriage from port of loading to port of discharge. However, if during this period damage from fire results, the owner or charterer will not be responsible for the fire damage *unless* the fire was caused by the "design or neglect" of the shipowner or with the "actual fault or privity" of the COGSA charterer. As previously noted, this modifying language has resulted uniformly in underwriters, such as Assuranceforeningen SKULD, excluding from coverage fire unless the cause is determined to be as a result of the owner's "design or neglect" or the charterer-carrier's "actual fault or privity." In other words, the P and I insurance of shipowners and charterers is limited by the "laws modifying the liability of the shipowner," as well as the terms of the bills of lading. W. Winter, *Marine Insurance* 307 (3d ed. 1952).

P and I insurance—Protection and Indemnity—is a special concept which was formed and implemented to protect members against legal liability, *e.g.* liability imposed by law applicable to the contract of carriage. Thus, the coverage is not wide-open, but is based on a member's possible liability for damage to or loss of cargo taking into account the applicable statute and case law.

In the case of damage by fire, Assuranceforeningen SKULD as well as practically every other P and I Club[4]

[4] The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited
(Managers: Thos. R. Miller & Son (Bermuda))

in the world bases its standard coverage for U.S. claims on the same requirements as set forth above, namely, fire coverage based on "design or neglect" and/or "actual fault of privity."

The extent of coverage must now be understood in the framework of the premium system which in P and I insurance is based on mutuality. The premium system is non-profit in that the "advance call" or premium is set at the beginning of each year based on certain criteria such as the type of vessel (dry cargo liner, tanker, tramp, etc.), the geographical trade of the vessel, and the type of trade the members are in (liner service, tramp, etc.).

The West of England Ship Owners Mutual Protection & Indemnity Association (Luxembourg)
(Managers: The West of England Ship Owners Mutual Insurance Association (London) Limited)
The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited
(Managers: Charles Taylor & Co. (Bermuda))
The London Steam-Ship Owners' Mutual Insurance Association Limited, London
(Managers: A. Bilbrough & Co. Ltd., London)
The Britannia Steam Ship Insurance Association Limited, London
(Managers: Tindall, Riley & Co., London)
The Newcastle Protection & Indemnity Association, Newcastle
(Managers: Martin Fryer and P. M. Fryer)
The Steamship Mutual Underwriting Association Limited, London
(Managers: Alfred Stocken & Co. Ltd., London)
The North of England Protecting & Indemnity Association Ltd., Newcastle
(Managers: W. Ferguson, Newcastle)
The Sunderland Steamship Protecting & Indemnity Association, Sunderland
(Secretaries: John Rutherford & Son)
The Liverpool and London Steamship Protection & Indemnity Association Ltd., Liverpool)

In addition:

The Japan Ship Owners Mutual P & I Association, Kobe
and
The International Tanker Indemnity Association Ltd., London
Oceanus Mutual Underwriting Association (Bermuda) Ltd.
(Managers: John Laing (Management) Ltd., London)

However, it *does not* take into account that one of the entered vessels will be going into one area of the United States where the Fire Statute and fire exemption are given different meanings from everyplace else in the United States. The result in the present decision, if allowed to stand, would not only require changes in P and I coverage for shipowners and charterers throughout the world doing business with the West Coast of the United States, but more importantly shifts the allocation of risk from the cargo underwriter to the P and I Clubs such as Assuranceforeningen SKULD. This is strictly against the allocation of risk system enacted by Congress in 1851 which has been followed *uniformly* in the United States since that time until this case.

P and I underwriters would have to increase their rates on vessels doing business with the West Coast, which would result in higher freight charges on cargo moving to and from the West Coast. Eventually the cost would be reflected on the grocery shelf because it does not necessarily follow that cargo underwriters will be prepared to reduce their premiums.

The impact of the Ninth Circuit decision in *The Gladiola* will be immediate and harmful in that it now allows cargo underwriters, who charge a full-risk premium for fire coverage, to proceed via subrogation against a vessel owner or charterer without regard to the heretofore requirement that the carrier risk be limited to that narrow area where damage is due to fires caused by the actual fault or privity of the carrier or his personal design and neglect. This acknowledged stiff burden of proof was set up based upon express Congressional intent to let the fire risk rest with the cargo interest, except in the specified narrow area of fires caused by the carrier's per-

sonal involvement. The result will be harmful in two ways in that it will allow the cargo underwriter to reap an unfair "windfall" from the switch in the allocation of risk back to the owner-charterer, and it will cause a dramatic increase in the calls or premium due the P and I Clubs as a result of the increases in losses. Since ship fires usually cause heavy losses, these increased premiums must necessarily result in the dramatic increases in the freight rates which will only add the profits of the cargo underwriters. Needless to say, this accomplishes exactly the *opposite* result intended by Congress. See *The Venice Maru,* supra, at pages 255-256.

As outlined above, the concern of Assuranceforeningen SKULD is that the decision by the Ninth Circuit will drastically upset the world shipping market by throwing protection and indemnity associations into a cycle that will raise the calls or premiums, which in turn must be reflected in increases in shipping freight rates on vessels calling at West Coast ports, which in turn must have an effect on the movement of commerce to one section of the United States. Furthermore, this shift in the "allocation of risks" may lead to economic waste, as P and I insurance coverage for fire risk to a particular shipment may cost more than fire coverage under a cargo policy. The reason for this is that the cargo owner knows the value of his cargo and will cover only that value. The carrier can only guess at the values of cargo he will carry and will tend to over-insure in the excess insurance markets. The costs of such insurance are "forced" upon the shipper through increased freight rates. Cargo insurance spreads the cost of covering fire risk on any voyage among many cargo interests in direct relation to the nature of their risks, based upon known values, whereas

the cost of P and I insurance is spread over freight rates on an average basis, with the accumulated burden of loss falling on one policy based on the estimate of maximum exposure.[5]

The Circuit Court's Misinterpretation of the Law

The error introduced by the Circuit Court in *The Gladiola* decision is its requirement that "due diligence" be proven as an "overriding obligation" before an owner or charterer may avail itself of the exoneration. However, nowhere in the language of the Fire Statute, 46 U.S.C. § 182, will one find any reference to this overriding obligation or prerequisite to exercise "due diligence" in order to claim the protection of the Statute.

Furthermore, when the Harter Act was enacted in 1893, the Fire Statute was preserved *in toto* without any requirement by the carrier, either shipowner or charterer, to prove the exercise of due diligence by its employees. 46 U.S.C. § 196.

Finally, in 1936, Congress enacted the U.S. Carriage of Goods by Sea Act (COGSA) which was modelled on the Hague Rules of 1924. COGSA, as the legislative history shows, was enacted to supersede the Harter Act in respect to foreign commerce.[6]

It is interesting to note that during the hearings on S. 1152 (COGSA) before the Committee on Merchant Marine

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[5] See C. McDowell, Containerization: Comments on Insurance and Liability, 3 J. Mar. & Comm. 503-507 (1972).

[6] S. Rep. No. 783, 74th Cong. 1st Sess. 5 (1935):

> "The bill, when enacted, will, in respect of foreign commerce by sea supersede the present act of February 13, 1893, popularly known as the 'Harter Act' from the time the goods are loaded on, to the time when they are discharged from the ship."

and Fisheries of the House of Representatives in 1936, it was thought that since the Fire Statute, 46 U.S.C. § 182, applicable to shipowners, had been preserved *in toto* by the Harter Act, the wording of the fire exemption of COGSA contained in Section 4(2)(b), applicable to all carriers, might cause "confusion and uncertainty" in that the fire exemption did not contain the same wording as the Fire Statute. The Committee report notes:

> "Section 4(2)(b) of the bill notwithstanding the saving provisions of section 8, is thought to be in conflict with the fire statute (U.S.C. title 46, sec. 182) because of the use of the words *unless caused by the actual fault or privity of the carrier* in the bill, whereas, in the fire statute the qualifying words are, *unless * * * caused by the design or neglect of such owner.* This phrase in the bill is taken from the British Act, and has been given an interpretation by the British courts different from that given by the Supreme Court to the corresponding phrase in our fire statute. Enactment of 4(2)(b) undoubtedly would cause confusion and uncertainty; and since the bill itself in section 8 disclaims all intent to modify the fire statute, and there is no apparent reason why it should be modified, it is thought section 4(2) (b) should be changed to read:
>
> '4(2)(b): Fire, unless caused by the design or neglect of the carrier.' "[7]

It is submitted that the main reason why the language of the COGSA fire exemption was not changed was because "actual fault of privity" was the language used in

[7] Hearings on S. 1152 Before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess. 13 (1936).

the international convention in drafting the Hague Rules of 1924. A driving force behind the drafting and adopting of the Hague Rules was a worldwide movement for standardization of maritime laws. As was expressed in the petition for certiorari in *The Venice Maru,* supra,

> "The Hague Rules, which are incorporated in both the American and British Carriage of Goods Acts, contain an exception against liability for loss to fire. The language of these Rules is identical in England and in the United States, and if they are to receive a different interpretation in two countries, many years of painstaking work by commercial men to arrive at uniformity in the law of carriers will have gone for naught."[8]

Needless to say, the Court allowed the petition and later reversed a rather novel construction of the Fire Statute decided by the lower court, thus restoring harmony between the two jurisdictions.[9]

In regard to novel construction of the Fire Statute, the Circuit Court in this case has misconstrued not only the COGSA fire exemption but also the Fire Statute by reading into the unambiguous language of the statutes a requirement that a shipowner prove the exercise of due diligence by his employees as well as himself prior to being able to take advantage of either the Fire Statute or fire exemption. This reasoning is based on a misapprehension of what the COGSA legislation superseded.

Again, referring to the legislative history of COGSA as it was being discussed in committee, the specific purpose

[8] A. Knauth, *The American Law of Ocean Bills of Lading,* 137 (4th ed. 1953).

[9] Consumers Import Co., Inc. v. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S. 249 (1943).

of the enactment of COGSA was to keep the United States in competition with the rest of the world's shipping nations. COGSA was no more than the United States' enactment of the Hague Rules of 1924. However, since the United States already had existing legislation dealing with ocean transportation, namely, the Harter Act and the Fire Statute, Congress wanted it understood what changes would result in enacting the new legislation.

When it came to dealing with the changes between the Harter Act and COGSA, the Hearings Before the Committee on Merchant Marine and Fisheries, House of Representatives show a clear understanding of the differences:

> 3. *Specific exemptions from liability.* Section 4(2)(a) to (p) grant a carrier exemptions from certain enumerated causes. It is these provisions, and these alone, under the bill which grant the shipowner substantially his only advantage from the legislation. Of the exemptions, 11 are contained in the Harter Act, (passed in 1893), but with this modification:
>
> *Under the Harter Act, in order to enjoy the benefits of the exemptions, the shipowner is under the burden of establishing that he has exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied. If he sustains that burden, then he will be entitled to exemption from liability for losses resulting from the causes enumerated in paragraphs (a), (c), (d), (f), (g), (m) and (n).*
>
> *Thus the burden as to which the shipowner is relieved is that of showing that he exercised due diligence to make his vessel seaworthy.* However, the shipowner will not be relieved in the above respect if his failure to use due diligence to make the vessel seaworthy, or negligence in the care and custody of the cargo, contribute to the loss.
>
> *The principal gain to the carrier under the bill, therefore, would be exemption from loss or damage from the enumerated causes, such as negligence in navigation, without being required to show, as a condition precedent,* that due diligence was exercised to make the vessel seaworthy, unless unseaworthiness contributed to the loss. If it does so contribute, then the carrier will not receive any advantage not enjoyed under existing law and right of contract.[10] (Emphasis added)

The point that must be recognized, which was completely overlooked by the Ninth Circuit, is that the due diligence requirement that was "up front" in the Harter Act and was still a part of the COGSA but simply under an altered burden of proof scheme, was *never* a part of the fire defense under either the Fire Statute which was preserved by the Harter Act[11] or under the COGSA "saving clause."[12]

The quotation cited above from the Committee Hearings shows that Congress' purpose in changing the due diligence requirement did not affect either the application of the Fire Statute, Harter Act or COGSA as none were concerned with "due diligence" when the fire defense was asserted. This can be readily seen from the absence of "(b)", 46 U.S.C. § 1304(2)(b), from the quotation above entitled "Specific exemptions from liability."

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[10] Hearings on S. 1152 Before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess. 63 (1936).

[11] 46 U.S.C. §196.

[12] 46 U.S.C. §1308.

The Circuit Court, in final analysis, confused the general failure to exercise due diligence by any of the owner's employees, which casts liability in the usual unseaworthiness case, with the actual fault or privity of the carrier relating to an unseaworthy condition which results in fire damage. It is the latter which is required to cast liability on the carrier under 1304(2)(b) and the burden of proving the carrier's personal failure to exercise due diligence, i.e. his "actual fault or privity," is on the shipper. The burden is the same as to all defenses listed from 1304(2)(a) to 1304(2)(p). The distinction is found in Section 1304(2)(q),[13] where the burden is placed on the carrier and is expressed in the same terms as 1304(1).

The state of the law on burden of proof is (and has always been until this decision) as follows:

The carrier makes out a *prima facie* defense under the Fire Statute or the fire exemption of COGSA by proving the damage complained of was caused by fire. The burden then shifts to the cargo interest to prove that the loss was caused by the "design or neglect" of the shipowner or the "actual fault or privity" of the owner or charterer, as the case may be. Both phrases amount to the same thing. In some instances, the carrier's personal failure to exercise due diligence to make the vessel seaworthy may constitute the "neglect" or the "fault" and such proof by cargo interests will cast liability of the cause for the fire damage. The fire exemption of § 1304(2) (b) however, limits liability for unseaworthiness or for any other cause of the fire, to those causes brought about by the "actual fault or privity" of the carrier. The Fire Statute does, and should, operate on the same burden of proof.

[13] 46 U.S.C. §1304(2)(q).

Conclusion

One of the most dreaded fears of the sea is fire aboard ship. Fires have consumed innumerable vessels and their cargo over the centuries and will in all likelihood continue to do so, hopefully on a reduced scale, but needless to say the risk of loss is large and will continue. Since at least 1851 in this country, the risk of fire loss to cargo has been allocated by statute to be primarily the burden of the cargo interests, unless the vessel owner or charterer personally knew or should have known of the condition that caused or contributed to the fire. This scheme has resulted in a complicated yet practical approach to compensating the concerned parties for these losses and for apportioning marine fire risk among their respective underwriters. The Ninth Circuit decision in this case raises questions of the utmost importance to the world-wide marine underwriting community, as well as to shippers and carriers alike, and therefore, deserves plenary consideration by this honorable Court with briefs on the merits and oral arguments.

Respectfully submitted,

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